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Negligence – Guest Statute – Right of Recovery

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in a prior advisory opinion ruled that a pardon blotted out the offense in the eyes of the law.¹⁸ The court has not literally interpreted this "blotting out" theory since it later held that a pardon does not restore one to the practice of law;¹⁹ nor will it preclude revocation of a license to practice medicine.²⁰ They consider proceedings for a criminal act and for disbarment as separate and distinct, and a pardon for the former is not a pardon for the latter.²¹ These decisions, however, concerned license privileges and did not construe the habitual offender law.

In the principal case the court bases its decision upon an exclusionary rule of statutory construction. It was concluded that it was the legislative intent to exclude pardoned offenses by not expressly including them in the habitual offender law.²² A cardinal rule of statutory construction provides that a statute is to be construed according to the intent of the legislature.²³ All other rules of statutory construction are subordinate and are mere aids in determining legislative intent.²⁴ It is submitted it may have been the intent of the legislature to include pardoned offenses in the application of this law. However, these statutes should have no bearing when a pardon is given because of innocence, since the element of criminal habit is not present. The habitual offender laws are designed to deter crime and thereby to protect society. These statutes are not directed to any particular crime but only to the recurrent offender.

The criminal character or habits of the individual, the chief postulate of the habitual criminal statutes, is often as clearly disclosed by a pardoned conviction as by one never condoned.²⁵

Iva W. Kay, Jr.

NEGLIGENCE—GUEST STATUTE— RIGHT OF RECOVERY

The plaintiff sued for the wrongful death of her minor child who was killed while riding as a guest in the defendant's automobile. *Held*, the guest statute¹ applied, thus precluding the plaintiff from recovering where the

18. *In re* Advisory Opinion to the Governor of Florida, 14 Fla. 318 (1872).

19. *State v. Snyder*, 136 Fla. 875, 187 So. 381 (1939).

20. *Page v. Watson*, 140 Fla. 536, 192 So. 205 (1938); *State v. Hazzard*, 139 Wash. 487, 247 Pac. 957 (1926); *accord*, *Prichard v. Battle*, 178 Va. 455, 17 S.E.2d 393 (1941).

21. *Branch v. State*, 120 Fla. 666, 163 So. 48 (1935).

22. *Kelley v. State*, 204 Ind. 612, 185 N.E. 453 (1933); *State v. Martin*, 59 Ohio St. 212, 52 N.E. 188 (1898); *contra*, *People v. Biggs*, 9 Cal.2d 508, 71 P.2d 214 (1937).

23. *State v. Taylor*, 80 So.2d 618 (Ala. 1954); *Abood v. City of Jacksonville*, 80 So.2d 443 (Fla. 1955); *Crawford v. School Dist.* 6, 342 Mich. 564, 70 N.W.2d 789 (1955).

24. *United States v. Raynor*, 302 U.S. 540 (1938); *Johnson v. Southern Pac.*, 196 U.S. 1 (1904); *State v. Doran*, 124 Conn. 160, 198 Atl. 573 (1938).

25. *People v. Biggs*, 9 Cal.2d 508, 71 P.2d 214, 216 (1937).

1. FLA. STAT. § 320.59 (1955).

death was the result of *simple negligence*. *Brailsford v. Campbell*, 89 So.2d 241 (Fla. 1956).

In the absense of a guest statute, the general rule in almost all jurisdictions is that the person operating or responsible for the operation of an automobile must exercise reasonable and ordinary care for the safety of a guest therein.² However, a majority of the states have so-called "automobile guest statutes."³ A few other jurisdictions have adopted the guest rule by judicial decision.⁴

Generally, these statutes preclude the guest from recovering from his host for injuries sustained due to the latter's simple negligence. The statutes require a finding of "gross negligence,"⁵ "wilful and wanton misconduct,"⁶ and/or "intoxication"⁷ on the part of the driver in order for the guest to recover.

In those jurisdictions which have adopted guest statutes a problem arises when the guest dies. Must the plaintiff prove gross negligence as would have been required of the guest? Or does the death statute which requires only simple negligence pre-empt the field? In all but two⁸ states which subscribe to the "automobile guest" doctrine, the beneficiaries under the wrongful death statutes may not recover for the death of a guest in the absence of *gross negligence*.

2. 60 C.J.S., *Motor Vehicles* § 399 (1a) (1949).

3. ALA. CODE Tit. 36, § 95 (1940), ARK. STATS. § 75-913 (1947), CAL. VEHICLE CODE § 403 (1947), COLO. STAT. ANN. c. 16, § 371 (1935), DEL. CODE ANN. Tit. 21, § 6101 (1953), FLA. STAT. § 320.59 (1955), IDAHO CODE § 49-1001 (1947), S.H. ILL. ANN. STAT. c. 95½, § 58 (1941), BURNS' ANNO. IND. STATS. § 47-1021 (1952), IOWA CODE ANN. § 321.494 (1949), KAN. GEN. STAT. § 8-122 (1949), MICH. COMP. LAWS § 256.29 (1948), MONT. REV. CODES § 32-1113 (1947), NEB. REV. STAT. § 39-740 (1943), NEV. COMP. LAWS § 4439 (1931-1947 Supp.), N.M. STAT. § 64-24-1 (1953), N.D. REV. CODE § 39-1502 (1943), OHIO REV. CODE § 4515.02 (1953), ORE. REV. STAT. § 30.110 (1955), S.C. CODE OF LAWS Tit. 46 § 46-801 (1952), S.D. CODE § 44.0362 (1939), TEX. CIV. STAT. Art. 6701b (Vernon 1925), UTAH CODE ANN. § 41-9-1 (1953), VT. STAT. REV. § 10,223 (1947), VA. CODE § 8-646.1 (1950), WASH. REV. CODE § 46.08.080 (1951), WYO. COMP. STAT. § 60-1201 (1945).

4. *Epps v. Parrish*, 26 Ga. App. 399, 106 S.E.297 (1921); *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168 (1917).

5. See statutes cited in note 2 *supra* for Florida, Kansas, Michigan, Montana, Nebraska, North Dakota, Oregon, Vermont, Virginia, and Wyoming.

6. See statutes cited note 2 *supra* for Alabama, California (just "willful"), Florida, Illinois, Indiana, Michigan, North Dakota (just "willful"), Ohio, South Dakota, Utah (just "willful"), and Wyoming.

7. See statutes cited note 2 *supra* for California, Colorado, Idaho, Iowa, Nebraska, North Dakota, Oregon, and Utah. Other terms used are: "intentional" (Colorado, Delaware, Idaho, New Mexico, Oregon, South Carolina, Texas, and Washington), "reckless disregard" (Idaho, New Mexico, Oregon, South Carolina, and Texas), "wilful and wanton disregard" (Arkansas, Colorado, Delaware, and Virginia), "heedlessness" (New Mexico, South Carolina, and Texas), "reckless operation" (Iowa and Montana), "wanton negligence" (Kansas), and "wilful negligence" (Vermont).

8. In Massachusetts the beneficiary of a wrongful death statute may recover for simple negligence. *Gallup v. Lazott*, 271 Mass. 406, 171 N.E. 658 (1930); *Shapiro v. Lyon*, 254 Mass. 110, 149 N.E. 543 (1925); *Flynn v. Lewis*, 231 Mass. 550, 121 N.E. 493 (1919). The question is still undecided in Delaware.

The results are not all reached in the same manner. The rationale depends on the provisions of the statute involved. There are three basic types of guest statutes. All require the higher degree of culpability previously mentioned. The effect of the first type is to restrict the guest's right of recovery.⁹ The second limits the liability of the owner or operator,¹⁰ and the third type precludes either the guest or his survivors from maintaining an action in the absence of gross negligence.¹¹ Only the first class of statute appears to allow the beneficiaries to maintain their action on simple negligence. Fifteen states have guest statutes of this nature.¹² In nine of these states the wrongful death statute permits recovery only in cases where the deceased could have prevailed had he lived.¹³ Four of the six remaining states have wrongful death statutes which do not predicate

9. ARK. STATS. § 75-913 (1947), CAL., VEHICLE CODE § 403 (1947), COLO. STAT. ANN. c. 16, § 371 (1935), DEL. CODE ANN. Tit. 21, § 6101 (1953), FLA. STAT. § 320.59 (1955), IDAHO CODE § 49-1001 (1947), KAN. GEN. STAT. § 8-122 (1949), MICH. COMP. LAWS § 256.29 (1948), N. M. STAT. § 64-24-1 (1953), ORE. REV. STAT. § 30.110 (1955), S. C. CODE OF LAWS Tit. 46 § 46-801 (1952), S. D. CODE § 44.0362 (1939), TEX. CIV. STAT. Art. 6701 b (Vernon 1925), WASH. REV. CODE § 46.08.080 (1951), WYO. COMP. STAT. § 60-1201 (1945). Typical of these is Florida's:

No person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle, and unless such gross negligence or willful and wanton misconduct was the proximate cause of the injury, death or loss, for which the action is brought

10. ALA. CODE Tit. 36, § 95 (1940), BURNS' ANNO. IND. STATS. § 47-1021 (1952), IOWA CODE ANN. § 321.494 (1949), MONT. REV. CODES § 32-1113 (1947), NEB. REV. STAT. § 39-790 (1943), OHIO REV. CODE § 4515.02 (1953), VT. STAT. REV. § 10,223 (1947). Alabama's statute is representative:

The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damages arising from injuries to or death of a guest while being transported without payment therefor, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle.

11. S. H. ILL. ANN. STAT. c. 95½, § 58 (1941), NEV. COMP. LAWS § 4439 (1931-1947 Supp.), N. D. REV. CODE § 39-1502 (1943), UTAH CODE ANN. § 41-9-1 (1953), VA. CODE § 8-646.1 (1950). A good example is North Dakota's statute:

Any person who as a guest accepts a ride in any vehicle moving upon any of the public highways of this state, and who while so riding as such guest receive or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. In the event that such person while so riding as such guest is killed or dies as the result of an injury sustained while so riding as such guest, then neither the estate nor the legal representatives nor heirs of such guest shall have any right of recovery against the driver or owner of said vehicle by reason of the death of such guest The provisions of this chapter shall not be construed as relieving the owner, driver, or person responsible for the operation of a vehicle from liability for injury to or death of a guest proximately resulting from the intoxication, willful misconduct, or gross negligence of such owner, driver, or person responsible for the operation of such vehicle.

12. See note 8 *supra*.

13. ARK. STATS. § 27-903 (1947), COLO. STAT. ANN. c. 50, § 2 (1935), KAN. GEN. STAT. § 60-3201 (1949), MICH. COMP. LAWS § 691.581 (1948), N. M. STAT. § 22-20-1 (1953), S. C. CODE OF LAWS Tit. 10 § 10-1951 (1952), S. D. CODE § 37.2201 (1952 Supp.), TEX. CIV. STAT. Art. 4671-72 (Vernon 1925), WYO. COMP. STAT. § 3-403 (1945).

recovery on the deceased's cause of action.¹⁴ Of these four, those in Idaho and Washington have been interpreted in the courts as not allowing recovery if the deceased never had a cause of action.¹⁵ The same result has been reached in California, apparently without noticing the conflict.¹⁶ The issue has eluded the Delaware court. Oregon, like Florida, has two wrongful death statutes. That is, each state has a statute which gives a parent a cause of action for the death of a minor child with no mention made of the child's cause of action had he lived,¹⁷ and each also has a statute which gives an administrator a cause of action for wrongful death only in cases where the deceased would have had a right of recovery had death not ensued.¹⁸

In the instant case the majority of the court disregarded the express words of the statute allowing recovery by the parent for the death of a minor child and held that the legislature had really meant to say that the parent could recover only if the child could have recovered had death not ensued. All the states which have adopted a guest statute have arrived at the same result. But in reading the statutes it is quite apparent that in most cases the legislatures have failed to realize that the wording they have used is ambiguous.

FRANK M. DUNDAUGH III

14. CAL. CODE OF CIV. PROCEDURE § 377 (1949), DEL. CODE ANN. Tit. 10, § 3704 (1953), IDAHO CODE § 5-310 (1947), WASH. REV. CODE § 4.20.010 and 4.24.010 (1951).

15. *Helgeson v. Powell*, 54 Idaho 667, 34 P.2d 957 (1934); *Upchurch v. Hubbard*, 29 Wash. 2d 559, 188 P.2d 82 (1947).

16. *Davis v. Oldendorph*, 130 Cal. App. 2d 314, 278 P.2d 956 (1955); *Humphreys v. San Francisco Area Council, B.S.A.*, 22 Cal.2d 436, 139 P.2d 941 (1943); *Howard v. Howard*, 132 Cal. App. 124, 22 P.2d 279 (1933).

17. FLA. STAT. § 768.03 (1955), ORE. REV. STAT. § 30.010 (1955). The recent case of *Whang v. Hougum*, 61 Ore. Adv. Sh. 589, 290 P.2d 185, *aff'd*, 61 Ore. Adv. Sh. 677, 291 P.2d 720 (1955) has interpreted the Oregon statute in the same way that the instant case has interpreted Florida's. The Oregon court actually grasped hold of the conflicts, though, and reasoned them out.

18. FLA. STAT. § 768.02 (1955), ORE. REV. STAT. § 30.020 (1955).